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IN THE

Supreme Court Of The United States

October Term, 1994

VIRGINIA GASOLINE MARKETERS AND AUTOMOTIVE REPAIR ASSOCIATION, INC.,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE WMDP SERVICE STATION AND AUTOMOTIVE REPAIR ASSOCIATION; MINNESOTA SERVICE STATION AND CONVENIENCE STORE ASSOCIATION; WISCONSIN AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATES; IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION; AND, GEORGIA ASSOCIATION OF PETROLEUM RETAILERS IN SUPPORT OF THE PETITIONER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae brief is filed on behalf of state and regional service station and automotive repair associations representing over 3,500 retail service station dealers from states in the Third, Fourth, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits.[1] An important function of these trade associations is to represent the interests of their members on critical issues before courts, legislatures and regulatory agencies.

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit has serious adverse implications for retail service station dealers nationwide in that it strikes down on federal supremacy and preemption grounds an entire state statute regulating substantive terms of petroleum franchise agreements. The decision below converts the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-2806, enacted by Congress as a shield to protect retail dealers from arbitrary and discriminatory franchise terminations, into a destructive weapon, capable of destroying extensive state statutory and common law protections.

As expressed by Chief Judge Ervin in dissent, the majority opinion has very troublesome implications. Under the majority's broad preemption approach, state regulation of any aspect of the contractual relationship between dealers and distributors would be obliterated by a federal statute having nothing to do with this aspect of the relationship, leaving a huge void that would, contrary to this Court's teachings, necessarily have to be filled through the development of federal common law related to petroleum franchises.

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[1] The District of Columbia, as well as the states of Maryland, Delaware, Pennsylvania, Minnesota, Iowa, North Dakota, Michigan, Wisconsin and Georgia are represented by the Associations participating in this Amicus Curiae brief.

The preemptive scope of PMPA is one with which the lower courts are constantly presented; one over which the lower courts are continually disagreeing; and, particularly in light of the broad brush approach taken by the Fourth Circuit, one that requires a definitive ruling by this Court. PMPA was enacted by Congress in 1978 and there have been hundreds of cases decided under it; yet, this Court has yet to interpret this very significant federal statute. The present case is a compelling one for review. The Fourth Circuit has turned the PMPA on its head and has misapplied this Court's preemption teachings in the process.

The significance of the preemption issue to the nation's petroleum marketing industry and the preservation of state statutory and common law protections is enormous. Amicus Curiae urge the Court to grant the Petition for Writ of Certiorari.

II. SUMMARY OF ARGUMENT

The decision by the Fourth Circuit Court of Appeals has eviscerated Virginia law regulating gasoline franchises and has, in the process, created the very real potential for eliminating all other state statutes and common law applicable to gasoline retailers.

Despite the limiting reach of the express preemption language of §2806(a) of the PMPA, and the limited preemption interpretation given by some other courts of appeals, the Fourth Circuit has made the deepest possible cut to the heart of state regulation. This broad application of PMPA preemption is contrary not only to the primary purpose of the PMPA, which is franchisee protection, but is also contrary to the preemption principles adopted by a majority of this Court in *Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 112 S.Ct. 2608, 102 L.Ed.2d 407 (1992). Those preemption principles mandate that:

1. "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."

2. Express preemption provisions are "construe[d] . . . in light of the presumption against the preemption of state police power regulations."

3. There is no "general, inherent conflict between federal preemption" requirements and "the continued vitality of state common law damages actions."

4. The courts "must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of" an express preemption provision.

5. "[E]ach phrase within [an express preemption] clause limits the universe of common law claims preempted by the statute." *Id.* 112 S.Ct. 2618, 2621.

The Fourth Circuit violated each of these principles with its broad and sweeping preemption decision.

In *CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69, 86 (1987) this Court held that "[t]he longstanding prevalence of state regulation . . . suggests that, if Congress had intended to preempt all state laws . . . it would have said so explicitly." Franchise regulation has traditionally been a longstanding area of state regulation under franchise statutes[2] and

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[2] State regulation of service station franchises is pervasive. *See, e.g.*, Code of Alabama 1975, Title 8, Ch. 22, §8-22-1 to §8-22-18; Alaska Statutes, Title 45, §45.50.800 to §45.50.850; Arizona Rev. Statutes, Title 44, Ch. 10, Article 8, §44-1551 to §44-1562; Arkansas Code of 1987 Anno., Title 4, Ch. 72, Subch. 4 and 5, §4-72-201 to §4-72-603; California Statutes of 1975, Ch. 640, Bus. & Professions Code, Division 8, Ch. 7.5, §20999 to §20999.4; Connecticut General Statutes, Title 42, Ch. 739, §42-126 to §42-133gg; Delaware Code Anno., Title 6, Ch. 29, §2901 to §2912; District of Columbia Code Anno., Title 10, Ch. 2, Subch. III, §10-221 to §10-227; D.C. Code, Title 45, Ch. 19, §45-1921 to §45-1951; Florida Statutes 1991, Title 33, Ch. 526,

under general legal principles that states can regulate transactions between merchants dealing with such matters as leases and supply arrangements. Contrary to the overriding purpose of the PMPA, which is *franchisee* protection, the Fourth Circuit's decision lays open the opportunity for courts to determine that there is no state common law or other state regulation that can be applied to govern the substantive terms of the contracts and agreements between petroleum franchisors and franchisees. Under the Fourth Circuit's analysis, each issue between the franchisor and the franchisee becomes a federal question because it can potentially become part of the end game of termination or non-renewal and hence be preempted.

Since its passage in 1978 at the height of the energy crisis, this Court has not reviewed any decision by a lower court interpreting the PMPA, despite a wide divergence of opinions

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§526.01 to §526-56; Official Code of Georgia Ann., Title 10, Ch. 1, Article 9, §10-1-230 to §10-1-241; Hawaii Rev. Statutes, Title 26, Ch. 486H, §486H-1 to §486H-9; Indiana Code, Title 23, Ch. 2.7, §23-2-2.7-1 to §23-2-2.7-7; Iowa Code, Title 13, Ch. 323, §323.1 to §323.14; Louisiana Rev. Statutes of 1950, Title 51, Ch. 14, §1451 to §1455; Maine Rev. Statutes Ann., Title 10, Ch. 215, §1451 to §1458; Ann. Code of Maryland, Comm. Law Article, Title 11, Subtitle 3, §11-301 to §11-308; Gen. Laws of Massachusetts, Title 15, Ch. 93E, §1 to §9; Minnesota Statutes 1992, Ch. 80C, §80C.01 to §80C.22; Mississippi Code 1972 Ann., Title 75, Ch. 24, §75-24-51 to §75-24-61; Revised Statutes of Missouri, 1986, Title 26, Ch. 407, §407.400 to §407-420; Nevada Rev. Statutes, Title 52, Ch. 597, §597.270 to §597.470; New Hampshire Rev. Statutes Ann., Title 31, Ch. 339-C, §339-C:1 to §339-C:23; New Jersey Rev. Statutes 1937, Title 56, Ch. 10, §56:10-1 to §56:10-29; New Mexico Statutes 1978, Ch. 70, Art. 8, §70-8-1 to §70-8-6; New York Gen. Business Law, Ch. 20, Article 11-B, §199a - §1991; Pennsylvania Statutes Title 73, Ch. 4, §202-1 to §202-8; Laws of Rhode Island, Title 5, Ch. 55, §5-55-1 to §5-55-9; Tennessee Ann. Code, Title 47, Ch. 25, Part 6, §47-25-601 to §47-25-626; Utah Code Ann. 1953, Title 13, Ch. 12, §13-12-1 to §13-12-8; Vermont Statutes Ann., Title 9, Ch. 109, §4101 - §4110a; Code of Virginia, Title 59.1, Ch. 2.2, §59.1-21.8 to §59.1-21.18:1; Rev. Code of Washington, Title 19, Ch. 19.100, §19.100.010 to §19.100.940; Code of West Virginia 1931, Ch. 47, §47-11C, *et seq.*; Wisconsin Statutes, Ch. 135, §135.01 to §135.07.

impacting the nation's second largest industry. This divergence of opinion is particularly widespread on the issue of preemption.

From the oil embargo to 1978, the number of gasoline dealers declined by 35,000[3] Since the passage of the PMPA, the decline has nevertheless continued. The absence of state law protection in the form of state regulation of the substantive provisions of franchise agreements will accelerate that decline because there will be no state statute or common law protections available if the Fourth Circuit's analysis is allowed to prevail.

The history of the PMPA, its express limiting language on preemption, the conflict of decisions among the circuits and the Fourth Circuit's failure to follow this Court's decisions requiring narrow application of express preemption provisions in federal legislation all mandate that the divided opinion of the Fourth Circuit be reviewed and reversed by this Court.

III. ARGUMENT

A. IF CONGRESS HAD INTENDED BROAD PREEMPTION OF SUBSTANTIVE STATE LAWS, IT WOULD HAVE SAID SO PLAINLY.

As this Court expressed in *CTS Corporation v. Dynamic Corporation of America*, *supra*, 481 U.S. 86, if Congress intended to preempt state regulation in an area long regulated by the states, it would have said so explicitly. The basic fact that different appellate courts have reached different conclusions on the language utilized by Congress, as well as the split decision by the Fourth Circuit itself, with the Chief Judge in dissent, indicates that Congress has not "explicitly" stated preemption in the broad fashion adopted by the majority of the Fourth Circuit panel. Furthermore, in determining that the preemption language of the PMPA broadly sweeps aside the body of state franchise law specifically crafted by the State of Virginia to

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[3] 124 Cong. Rec. §12762 (May 5, 1978) (Statement of Sen. Durkin), *cited in*, *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984).

avoid PMPA conflict, the Fourth Circuit fails to follow this Court's teaching in *Cipollone* that all state law is not "of a piece". Each must be weighed individually against the limiting language of the express preemption provision to determine whether or not there is room for the state regulation and the federal statute to co-exist. The Fourth Circuit has failed to recognize that the PMPA and the state laws can be interpreted and applied harmoniously.

If Congress had intended the broad preemption found applicable by the Fourth Circuit, Congress would have used language other than "to the extent" the PMPA applies "with respect to termination or non-renewal".[4] Instead, Congress would simply have stated that the PMPA preempts "with respect

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[4] The majority of the Fourth Circuit panel appears to have reached their determination of broad preemption by focusing exclusively on the "with respect to" language of Section 2806 while ignoring the very limiting introductory language of that section. *See*, 34 F.3d at 224. Section 2806 begins with the qualifying phrase "[t]o the extent that any provision of this subchapter applies to the termination . . . of any franchise . . . ." The provisions of Subchapter I govern grounds for termination and the notice required to terminate. Period. PMPA has nothing to do with regulating substantive provisions of the franchise, and there are no provisions of Subchapter I which purport to regulate such provisions. As the Second Circuit stated in *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300 (2d Cir. 1986):

> "[t]he PMPA neither expressly nor impliedly preempts all state law relating to any aspect of the termination or non-renewal of petroleum franchises. Rather, it preempts only state statutes as to grounds for, procedures for, and notification requirements with respect to termination or nonrenewal."

Rather than being mere surplusage or a congressional throat-clearing, the introductory phrase of Section 2806 is critical to a proper interpretation of the preemption provision. That the Fourth Circuit ignored this critical language of the Act is apparent from the Court's statement that "[t]he challenged provisions of S.B. 235 are not 'the same as' the PMPA *because they prohibit contractual terms the PMPA does not directly address.*" F.3d at 224 (emphasis added). If the PMPA does *not* address the issue, the state law that *does*

to [petroleum] franchises or franchise relationships." These are terms Congress defined in 15 U.S.C. §2801(1) and (2). This would have made clear that Congress intended to preempt the area of substantive franchise provision regulation.[5]

Instead, it is evident by the structure of the PMPA that Congress intended PMPA to interface with state law. §2801(1)(B)(iii) refers to any "applicable provision of State law which permits such transfer or assignment with out regard to any provision of the franchise." *See also*, §2803(b)(2) and §2806(b). Section 2802(c)(1) allows termination or non-renewal for fraud or criminal misconduct by the franchisee, standards that must be established under state law. Section 2802(c)(5) allows termination upon condemnation or other taking, creatures of state law. Section 2802(c)(6) indicates that

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address it is not preempted. Under the plain language of the statute, PMPA preempts matters with respect to termination or nonrenewal only "to the extent that any provision of [the PMPA] applies . . . ."

[5] In construing the PMPA preemption section, the District of Columbia Court of Appeals has noted "the limited nature of the preemption which this section prescribes." *Davis v. Gulf Oil Corporation*, 485 A.2d 160, 168 (D.C. App. 1984). In *Davis*, the Court contrasted the preemption language used by Congress in the PMPA with that used by Congress in ERISA. Said the Court:

> "This language is to be contrasted with that contained in preemption provisions such as the one included by Congress in the Employee Retirement Income Security Act (ERISA). 29 U.S.C. §1144(a) (1982). In drafting ERISA, Congress originally considered 'a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA.' *Shaw [v. Delta Airlines, Inc.*, 463 U.S. 85 (1983)], 103 S.Ct. at 2900-01. This initial 'limited' ERISA preemption provision was similar to PMPA §2806(a). *See id.* 103 S.Ct. at 2900-01, n.18. The Conference Committee acting on ERISA, however, rejected the proposed preemption clause as too narrow and substituted a provision which preempts 'any and all State laws insofar as they . . . relate to any employee benefit plan,' 29 U.S.C. §1144(a), regardless of whether such local laws address specific subject areas covered by ERISA. *Id.*, 103 S.Ct. at 2900-01 & n.19 & n.20."

termination or non-renewal can occur as a result of the loss of the trademark by the franchisor unless it is due to "violation of federal or state law." Section 2802(c)(8) allows termination for failure to pay timely "all sums to which franchisor is legally entitled," a standard that must be established under state law. Section 2802(c)(11) allows a franchisee to be terminated or non-renewed for failure to comply with state or local laws or regulations relevant to the operation of the marketing premises. Section 2802(c)(12) allows termination or non-renewal upon conviction of the franchisee of felonies involving moral turpitude. Each of the above instances indicates that Congress had no intention of eliminating state laws that would apply to the substantive terms of the contract between franchisees or franchisors. Moreover, the legislative history is devoid of any intent by Congress to eliminate the ability of the states to regulate substantive contract provisions.

B. THE DECISION BY THE FOURTH CIRCUIT ERRONEOUSLY RETURNS ALL ASPECTS OF THE FRANCHISE RELATIONSHIP TO THE END GAME OF TERMINATION AND NON-RENEWAL.

The Fourth Circuit holds that state law regulation of substantive contract provisions is preempted. The error of this approach is evident in the purpose and structure of the PMPA. The PMPA was enacted to deal with arbitrary and discriminatory terminations and nonrenewals. The PMPA established a presumption of franchise relationship continuation unless the franchisor could meet the test for termination or non-renewal under §2802.

To interpret the preemptive effect of §2806(a) to include the substantive provisions of the franchise laws, which states have historically been free to regulate, allows and invites the franchisors to make every matter between themselves and their franchisee a potential ground for termination and non-renewal.

As a result, instead of the PMPA acting as a check on termination and non-renewal, and a supplement to state statute and common law, it would instead supplant state statute and common law by forcing every franchisee into the crucible of termination/non-renewal when any of his contractual or other rights were threatened. In order to obtain any protection, the franchisee would have to risk termination or non-renewal in order to bring the action within the PMPA. Yet, this is precisely the caldron from which the PMPA was to extricate the gasoline dealer. The Fourth Circuit would deny a franchisee any right to a state remedy for franchisor violations during the term of the contract.

The principles of federalism, respect for the powers reserved by the states under the 10th Amendment,[6] and a respect for the role of state legislatures in governing commercial transactions, particularly against a background where states historically have regulated franchises, dictate that the PMPA's express preemption have a narrow application. Such a narrow preemp-

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[6] Under the 10th amendment to the United States Constitution the powers not delegated to the United States by the Constitution are reserved to the States or to the people. The majority opinion by the Fourth Circuit on the scope of preemption violates this 10th Amendment prohibition. In the area of contract formation, the franchisor is limited by the standards of "good faith, normal course of business, and not for the purpose of non-renewal" under §2802(b)(3)(A). In other words, the franchisor can non-renew a franchisee if the franchisee fails to agree to terms in the franchise agreement insisted upon by the franchisor subject only to the standards of §2802(b)(3)(A). If state law is preempted by the standard of good faith, then the scope of preemption is determined by those provisions that a franchisor chooses to put in a franchise contract. Indeed, this is the precise holding with regard to state regulation of rental levels by the Fourth Circuit. 34 F.2d at 226.

The 10th Amendment does not give Congress the power to grant to private business entities, such as the major oil companies, the power to override state regulations through the clever drafting of their counsel. In order to avoid the 10th Amendment conflict and to harmonize the PMPA with historic state regulation of the substantive provisions of contracts and franchisees, review and reversal of the Fourth Circuit's decision is necessary.

tion standard would leave states free to regulate the substantive provisions, and still give the PMPA its intended role in regulating the grounds for and method to be utilized for terminations and non-renewals. For example, a franchisee could still be terminated for failing to adhere to hours of operation provisions under §2802 of the PMPA. A state law could determine what maximum hours of operation could be imposed in the contract between the parties. If the franchisee violated those hours of operation, however, termination could occur. This would give appropriate and due deference to the state's bona fide interests not only in commercial regulation, but also in public safety and the welfare of its citizens under its police powers.[7]

C. REVIEW BY THIS COURT IS ESSENTIAL TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON THE SCOPE OF PMPA PREEMPTION.

This Court's guidance on the PMPA preemption question is necessary because of the inconsistent and unpredictable treatment given the issue by the lower courts. Congress' objective of national uniformity on the issue of petroleum franchise termination and nonrenewal is being frustrated rather than furthered because of the hodge-podge treatment of this issue by the courts.The nature and scope of the PMPA preemption problem is easily illustrated and summarized by comparing an excerpt from the Fourth Circuit's opinion in this case to an excerpt from opinions of the Second Circuit and the District of Columbia Court of Appeals.

According to the Fourth Circuit, "Congress used very broad language to define the PMPA's preemptive scope. The statute preempts any state law 'with respect to' termination or nonrenewal which differs from the PMPA."[8] *Mobil Oil Corp.*

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[7] Convenience store/service station attendants are frequent victims of criminal acts.

[8] Continuing, the Court states that

v. Virginia Gasoline Marketers and Automotive Repair Association, Inc., 34 F.3d 220, 225 (4th Cir. 1993). The Second Circuit, in contrast, finds that "[t]he PMPA achieves its uniformity goal through an express and carefully circumscribed preemption provision . . . ." *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 984 (2d Cir. 1989). To like effect, the District of Columbia Court of Appeals, examining the PMPA preemption provision, notes "the limited nature of the preemption which this section prescribes." *Davis v. Gulf Oil Corporation*, 485 A.2d 160, 168 (D.C. App. 1984). *See also*, *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F.Supp. 1008, 1017 (N.D. Ga. 1979), *aff'd sub nom.*, *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981) ("[b]y specifying with such precision when the states must stand aside in favor of federal regulation, Congress implicitly marked out the bounds of the power it intended to exercise. Beyond those limits, state regulation may claim full federal approbation").

Examples of this inconsistent treatment among the circuit courts of appeals illustrate the point.[9] In the Second Circuit, state goodwill statutes are not preempted, *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, while in the Fourth Circuit they are. *Jiminez v. BP Oil Inc.*, 853 F.2d 268 (4th Cir. 1988), *cert. denied*,

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> "[t]he broad scope of the PMPA's preemption clause indicates that Congress chose to protect franchisees by the means provided in the federal statute and to preclude supplementary state regulation of termination and nonrenewal as a means of franchisee protection. Most petroleum franchisors do business in a number of states and Congress has provided a law to govern petroleum franchises in all 50 states to ensure uniformity."

Id., at 225.

[9] Among the district courts, it is not unusual to find conflicting opinions even from the same court. *Compare*, for example, *Vasco v. Mobil Oil Corp.*, 698 F.Supp. 102 (D. Md. 1988) (Maryland hours of operation statute preempted) with *Eden v. Texaco Refining and Marketing, Inc.*, 644 F.Supp. 1573 (D.Md. 1986) (Maryland hours of operation statute not preempted).

490 U.S. 1011 (1989).[10] In the Sixth and Eighth Circuits, common law fraud claims are preempted, *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986); and *Continental Enterprises, Inc. v. American Oil Co.*, 808 F.2d 24 (8th Cir. 1986), while in the Ninth Circuit, they are not. *Pride v. Exxon Corp.*, 941 F.2d 251 (9th Cir. 1990). In the Sixth Circuit, a state franchise act claim related to the termination of an "ancillary franchise" is not preempted, *Geib v. Amoco Oil Co.*, 29 F.3d 1050 (6th Cir. 1994), while in the Ninth Circuit, it is. *Millett v. Union Oil Co. of Calif.*, 24 F.3d 10 (9th Cir. 1994). In the First Circuit, a state may regulate service station rents on the theory that such regulation is directed at a substantive element of a franchise agreement. *Esso Standard Oil Co. v. Department of Consumer Affairs*, 793 F.2d 431. The Third Circuit questions whether the PMPA can be interpreted as incorporating state substantive regulations, *O'Shea v. Amoco Oil Co.*, 586 F.2d 590 (3d Cir. 1989), while the Fourth Circuit specifically preempts any such legislation. *Mobil Oil Corp. v. Virginia Gasoline Marketers and Automotive Repair Assoc.*, 34 F.3d 220. *See also*, *Simmons v. Mobil Oil Corp.*, 29 F.3d 505 (9th Cir. 1994) (state law challenges to rent are preempted).

IV. CONCLUSION.

The issue of PMPA preemption is causing significant confusion and uncertainty in the lower courts. A definitive ruling on the issue by this Court is needed for the benefit of those courts, as well as the state legislatures and prospective litigants.

Chief Judge Ervin, in dissent, expressed concern that under the majority's approach to preemption, "any changes in state law, not just those particular to the petroleum franchise scenario, that affect the substance of these contract relationships must be struck down (at least as to petroleum franchisees) because they

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[10] *See also, Atkins v. Chevron USA, Inc.*, 672 F.Supp. 1373 (W.D. Wash. 1987)(State goodwill statute preempted).

narrow the grounds for termination." 34 F.3d at 230. It is this far-reaching implication about which Amicus Curiae are particularly concerned. There is a vast body of state petroleum franchise laws which, in part, compliment the PMPA by regulating substantive aspects of the contractual relationship. A loss of these state protections through federal preemption would be devastating to the industry and leave a large contractual void. Amicus Curiae respectfully request the Court to grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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